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It would seem a narrow holding to say that courts of equity and of admiralty have an inherent power to permit a poor suitor to sue *in forma pauperis*, that a common law court could permit an indicted defendant to do so, and then hold that the common law court could not extend the privilege to a plaintiff suing in an ordinary suit at law. In view of these analogies, the decision in the principal case seems sound.

E. B. P.

TORTS: DISTINCTION BETWEEN NEGLIGENCE AND NUISANCE.—Legal liability for damage caused to adjoining property by explosives has been founded on several grounds. The doctrines of negligence, nuisance, and *res ipsa loquitur*, have all been applied. *Fernandez v. Western Fuse Company*<sup>1</sup> is the last of a series of cases that arose in this state out of the explosion of the powder magazine of the Western Fuse Company by a murderer who had taken refuge therein. The case was brought upon the theory that the magazine was a nuisance. But while it was pending, *Kleebauer v. Western Fuse Company*<sup>2</sup> decided that the magazine of the company was not a nuisance *per se*, and that there was not on the part of the defendant negligence *per se*. Thereupon the plaintiff obtained a verdict upon evidence that the magazine was negligently constructed. This was reversed as being irresponsible to the pleadings. Although not using the term, the California court, following other cases, apply the *res ipsa loquitur* doctrine, and hold that, inasmuch as powder does not ordinarily explode, there is the presumption of negligence when it does, and that the defendant must show that he was not lacking in the use of due care.<sup>3</sup> Other courts have regarded the question as simply one of negligence.<sup>4</sup> Others have held that the presence of explosives constitutes a nuisance.<sup>5</sup> The doctrine of *Rylands v. Fletcher*<sup>6</sup> seems not to have been applied to this class of cases.<sup>7</sup>

<sup>1</sup> (Aug. 10, 1917), 25 Cal. App. Dec. 231, 167 Pac. 900.

<sup>2</sup> (1903), 138 Cal. 497, 71 Pac. 617.

<sup>3</sup> *Judson v. Giant Powder Co.* (1895), 107 Cal. 549, 40 Pac. 1020; *Kinney v. Koopman* (1897), 116 Ala. 310, 22 So. 593; *Tuckachinsky v. Lehigh Co.* (1901), 199 Pa. 515, 49 Atl. 308.

<sup>4</sup> *Lounsbury v. Foss* (1894), 30 N. Y. Supp. 89; *People v. Sands* (1806), 1 Johns (N. Y.) 78; *Collins v. R. R. Co.* (1894), 104 Ala. 390, 16 So. 140; *Sowers v. McManus* (1906), 214 Pa. 244, 63 Atl. 601.

<sup>5</sup> *Heeg v. Licht* (1880), 80 N. Y. 579; *McAndrew v. Collerd* (1880), 42 N. J. L. 189; *Henderson v. Sullivan* (1908), 159 Fed. 46.

<sup>6</sup> (1868), L. R. 3 H. L. 330.

<sup>7</sup> It has been applied to water in *Turpen v. Turlock Irrig. Dist.* (Oct. 17, 1903), 141 Cal. 1, 74 Pac. 295; and *Parker v. Larsen* 4 (1890), 86 Cal. 236, 24 Pac. 989; to oil in *Brennan Const. Co. v. Cumberland* (1907), 29 App. Cas. (D. C.) 554; to gas in *Evans v. Keystone Gas Co.* (1895), 148 N. Y. 112, 42 N. E. 513. See the limitation in *Ainsworth v. Lakin* (1901), 180 Mass. 397, 62 N. E. 746, and an article by Professor Bohlen 59 University of Pennsylvania Law Review, pp. 298, 423.

Negligence and nuisance are distinct doctrines<sup>8</sup>—the former sounds in torts, the latter relates to the law of property. Negligence is the breach of the duty to use due care towards another, whereby either his person or property is unintentionally injured.<sup>9</sup> It is the relation or manner of acting; the omission of due care fixes the liability. A nuisance exists when the use or condition of the property of one person is such as to injure the property of another or interfere with its enjoyment.<sup>10</sup> The violation of the property right fixes the liability,<sup>11</sup> the question of negligence is immaterial,<sup>12</sup> and the presence of due care affords no defense.<sup>13</sup> Equity will enjoin the nuisance by restraining such a use of the property,<sup>14</sup> but it cannot enjoin negligence. The doctrine of *res ipsa loquitur* is a rule of the law of negligence whereby negligence is presumed from the fact of the occurrence of the injury. The Rylands v. Fletcher rule (which is not applied to the powder cases) differs from nuisance in that while such absolute liability attaches only when a dangerous thing escapes from the land of one person, and damages the property of another, a nuisance exists where anything that is present on a man's property interferes with the enjoyment of the property of another.

In their application to the explosion cases these three doctrines have been kept distinct. Either one or the other has been applied. But some courts have regarded negligence as a necessary element in making the presence of powder a nuisance.<sup>15</sup> Pennsylvania alone seems to have distinguished between the cases where the injury arises from the natural and necessary development of the land itself, and where it is caused by the prosecution of a business having no necessary connection with the land. In the former class negligence is required, but not in the latter.<sup>16</sup> In this view,

<sup>8</sup> Heeg v. Licht, *supra* n. 5; Moses v. State (1877), 58 Ind. 185; State v. Boll (1875), 59 Mo. 321.

<sup>9</sup> Barrett v. Southern Pac. Co. (1891), 91 Cal. 296, 27 Pac. 666; Richmond v. Mo. Ry. (1908), 133 Mo. App. 463, 113 S. W. 708, 710; Louisville Ry. Co. v. Bean (1893), 9 Ind. App. 240, 36 N. E. 443; San Antonio Ry. Co. v. Vaughan (1893), 5 Texas. App. 195, 23 S. W. 745.

<sup>10</sup> Gardner v. Stroever (1891), 89 Cal. 26, 26 Pac. 618, Cal. Civ. Code, § 3479; Barnes v. Hathorn (1866), 54 Me. 124.

<sup>11</sup> Gardner v. Stroever, *supra* n. 10; State v. Yopp (1887), 97 N. C. 477, 2 S. E. 458.

<sup>12</sup> Heeg v. Licht, *supra* n. 5; Wood on Nuisances, pp. 89-90.

<sup>13</sup> American S. & R. Co. v. Godfrey (1907), 158 Fed. 225; State v. Boll, *supra* n. 8.

<sup>14</sup> Meridith v. Triple Island Gunning Club (1912), 113 Va. 80, 73 S. E. 721; Georgia v. Tenn. Copper Co. (1907), 206 U. S. 230, 51 L. Ed. 1038, 27 Sup. Ct. Rep. 618; Cope v. District Fair Ass'n (1881), 99 Ill. 489.

<sup>15</sup> Fisher v. Western Fuse Co. (1910), 12 Cal. App. 739, 108 Pac. 659; People v. Sands (1806), 1 Johns (N. Y.) 78; Collins v. R. R. Co. (1894), 104 Ala. 390, 16 So. 140.

<sup>16</sup> Hauck v. Tidewater Pipe Line Co. (1893), 153 Pa. 366, 26 Atl. 644; Penn. Coal Co. v. Sanderson (1886), 113 Pac. 126, 6 Atl. 453; Robb v. Carnegie Bros. (1891), 145 Pa. 324, 22 Atl. 649.

the powder cases would fall in the last class as nuisances. But the tendency of the law is to abandon the nuisance theory, except where, under the surrounding circumstances, the presence of powder produces a reasonable apprehension of danger to life and property.<sup>17</sup> This tendency is perhaps due to the increased use of explosives, which, with the better understanding of their handling, makes their presence both more familiar and less hazardous. The matter is largely regulated by state statutes and local ordinances.

A. W. B.

**TORTS: JOINT TORTFEASORS: BAR OF JUDGMENT AGAINST ONE.**—Though the point was but briefly considered, the case of *King v. San Diego Railway Company*<sup>1</sup> directs attention to the liabilities of joint tortfeasors. One of the most fertile sources for discussion in this connection is the effect of a judgment against one as a bar to an action against another for the same wrong. The subject has not always been accurately treated,<sup>2</sup> and the courts have often proceeded hastily and upon an inadequate consideration of principles and authorities.<sup>3</sup> It may not be amiss, therefore, to trace briefly and to criticise the opposing doctrines advanced in the determination of the question.

Lord Bowen stated in 1887 that it was "not possible in that year for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."<sup>4</sup> To those of the profession who realize how true this was in 1887 and how true it is today, the English doctrine that mere judgment against one of two joint tortfeasors will bar an action against the other is especially amazing.

The oldest case in the books is Lendall's case<sup>5</sup> where it was even doubted whether judgment plus execution would be a bar. But the law was determined otherwise in *Broome v. Wooton*.<sup>6</sup> While only the first reason was expressly emphasized, the case is cited as resting upon three grounds: (1) A judgment renders the damages certain. (2) The liability of joint tortfeasors is joint and not joint and several. (3) Upon judgment for damages

<sup>17</sup> *Bradley v. People* (1866), 56 Barb. 72; *Chicago W. & V. Coal Co. v. Glass* (1889), 34 Ill. App. 364; *Hazzard Powder Co. v. Volger* (1893), 58 Fed. 152.

<sup>1</sup> (Oct. 9, 1917), 54 Cal. Dec. 430, 168 Pac. 131.

<sup>2</sup> D. J. Kiser in 23 Cyc. at 450 says: "A judgment against one of two joint tortfeasors will preclude a recovery against the other," which is clearly not the American rule.

<sup>3</sup> *Petticolas v. City of Richmond* (1897), 95 Va. 456, 28 S. E. 566.

<sup>4</sup> *The Administration of the Law; The Reign of Queen Victoria*, Vol. I, p. 310.

<sup>5</sup> (1584), 1 Leon 19, 74 Eng. Rep. R. 18, and also *Morton's Case* in the same year. *Cro. Eliz.* 30, 78 Eng. Rep. R. 296.

<sup>6</sup> (1606), *Yelverton* 67, *Cro. Jac.* 73, 80 Eng. Rep. R. 47.